

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JERRY C. HUFF,

Defendant.

**MEMORANDUM DECISION AND
ORDER**

Case No. 2:08-cr-00371 CW

District Judge Clark Waddoups

On February 3, 2012, Defendant Jerry C. Huff filed a Motion for Court Appointed Habeas Corpus 2255 Counsel. A Section 2255 motion is a civil proceeding rather than a criminal matter.¹ *Trenkler v. United States*, 536 F.3d 85, 94 (1st Cir. 2008) (citations omitted). Consequently, a person “has no constitutional right to counsel in a habeas proceeding.” *United States v. Moya-Breton*, 439 Fed. Appx. 711, 716 (10th Cir. 2011). Instead, “the decision to appoint counsel is left to the sound discretion of the district court.” *Id.* (quotations, citations, and alteration omitted). An exception to this rule exists, however, if “the district court determines that an evidentiary hearing is required” based on the content of a § 2255 motion. *Id.* (quotations and citation omitted); *see also* Rule 8(c) of the Rules Governing Section 2255 Proceedings for the United States District Courts (2011).

¹ When a motion is filed under 28 U.S.C. § 2255 (a “§ 2255 motion”), the motion effectively begins a civil proceeding under a new case record and all pleadings and documents are filed under the new civil case number. The present motion is a request for appointment of counsel so Mr. Huff can pursue a § 2255 motion. Because it is not an actual § 2255 motion, no civil matter has been opened.

Here, determination of whether an evidentiary hearing is required is premature because Mr. Huff has not yet filed a § 2255 Motion. Thus, there is no requirement to appoint counsel at this time. The court further notes that Mr. Huff has completed his sentence and is no longer in custody. “[T]he substance of a § 2255 motion is that it is filed by ‘[a] prisoner *in custody* under sentence of a court.’” *Pilla v. United States*, Case No. 10-4178, 2012 U.S. App. LEXIS 2366, at * 8 (6th Cir. Feb. 6, 2012) (quoting 28 U.S.C. § 2255(a)) (emphasis added). As a result, courts typically “do not consider the merits of § 2255 motions filed by persons no longer in custody.” *Id.* (citation omitted). Because it is unlikely that Mr. Huff can prevail on a § 2255 motion,² the court concludes that appointment of counsel is not appropriate. It therefore DENIES Mr. Huff’s motion.

CONCLUSION

For the reasons stated above, the court DENIES Mr. Huff’s motion to appoint counsel.³

DATED this 23^d day of February, 2012.

BY THE COURT:

A handwritten signature in blue ink, reading "Clark Waddoups", is written over a horizontal line.

Clark Waddoups
United States District Judge

² Although the court concludes it is unlikely that Mr. Huff can prevail on a § 2255 motion, the court offers no opinion as to whether Mr. Huff could successfully prevail on his claims under a different theory or cause of action.

³ Dkt. No. 140.